IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,

Petitioner,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinions of the Court of Appeals for the Second Circuit are reported at 568 F.2d 974 (2nd Cir. 1977) and are reproduced in Appendix A to the Petition for Writ of Certiorari (P 1a-52a).* The opinion and order of the Dis-

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*Page references preceded by a "P" and followed by an "a" refer to pages of the Appendix to the Petition for Writ of Certiorari which contains all the opinions below. References through-

trict Court denying defendants' motion to restrict discovery is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B to the Petition (P 53a-89a). The opinion and order of the District Court certifying its prior opinion and order is unreported and is reproduced in Appendix C to the Petition (P 90a-98a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1977. Petition for Writ of Certiorari was filed on February 6, 1978, and this Court granted review on March 20, 1978.* The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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out to the Appendix filed with this brief will appear by number followed by an "a". References to deposition transcripts contained in the Supplemental Record on Appeal will be described by page numbers preceded by "L" for defendant Lando and "W" for defendant Wallace. The designation "Ex." followed by a number refers to exhibits marked at the deposition of defendant Lando, which are contained in the Supplemental Record on Appeal as part of document 67. The Lando deposition transcripts are documents 67-91 of the Supplemental Record on Appeal; the Wallace transcripts are documents 94-96 of that Record.

* By letter of the Clerk of this Court dated March 29, 1978, petitioner's time to file his brief and appendix was extended to May 31, 1978.

Questions Presented

Whether creation for libel defendants of an absolute privilege not to disclose the editorial process has undermined the balance previously struck by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny between competing social interests in the First Amendment and in the individual's right of legal redress for malicious damage to reputation?

Whether the creation of an absolute privilege of nondisclosure of the editorial process has effectively eliminated the possibility of proving liability for the calculated or reckless falsehood which the *Sullivan* principles had concluded was not entitled to any constitutional protection?

Whether the immunization of the editorial process has removed that area of media activity not only from defamation cases but also from suits involving media liability under statutes of general application?

Whether decisions of this Court concerning governmental conduct seeking to control what shall or shall not be printed are determinative of the level of First Amendment protections to be afforded disclosure of the editorial process in a post-publication *Sullivan* libel case?

Whether court decisions involving disclosure of confidential sources support the creation of a privilege of nondisclosure of editorial process in a libel action?

Whether there is a special First Amendment position occupied by the institutional press justifying the immunization of its editorial process from judicial scrutiny?

Statement of the Case

Petitioner, Anthony Herbert ("Herbert"), a retired United States Army Lieutenant Colonel, brought this defamation action under 28 U.S.C. §1332(a) against respondents ("defendants") and Atlantic Monthly Company for a broadcast entitled "The Selling of Colonel Herbert," presented by CBS on its 60 MINUTES Program ("Program") and produced by Mike Wallace and Barry Lando, and an article published by Atlantic Monthly and written by Lando. Herbert's present appeal is from a judgment of the United States Court of Appeals for the Second Circuit which reversed and remanded a discovery order of the United States District Court for the Southern District of New York and which created for defendants in libel actions governed by the principles of *Sullivan* an absolute privilege to bar disclosure of the editorial process.

The Pleadings

The complaint (8a-88a) alleges that Herbert enlisted in the U.S. Army at the age of 17 and rose through the ranks to Lieutenant Colonel. He spent 24 years in military service, and gained the highest professional reputation among his fellow soldiers and officers, as well as among the general public. He was the recipient of many awards and citations and during the 1950's toured much of the world on behalf of the United States Army. From September, 1968 to April, 1969 Herbert served with the 173rd Airborne Brigade in Vietnam. While in Vietnam, Herbert reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion and given a bad efficiency report. After his relief from command, Herbert attempted to process charges against his superior officers, General John W. Barnes and Colonel J. Ross

Franklin, for failing to act upon his reports and complaints and for covering up the charged atrocities. After months without any indication of action, Herbert filed a formal complaint with the Inspector General's Office against Franklin and Barnes. In March of 1971, Herbert brought formal charges at the U.S. Army Criminal Investigation Division (CID). Television and newspaper publicity regarding these charges followed. The Army conducted an investigation resulting in the dismissal of the charges. Ultimately, the Army itself conceded that 7 of the 8 incidents which Herbert charged his superiors had covered up did occur in the 173rd area of operations.

On February 4, 1973, CBS presented "The Selling of Colonel Herbert" as a factual report of a 60 MINUTES investigation into the validity of Herbert's charges. The complaint alleges that the Program falsely and maliciously depicted Herbert as a liar in his assertions that he had reported many atrocities to Col. Franklin or General Barnes, as a man capable of brutality to Vietnamese prisoners, and as a person who had used the war crimes charges as an excuse for his relief from command and who had perpetrated a hoax upon the American public. As a result of the Program, Herbert's reputation and good name were destroyed and he sustained severe financial losses.

The answers of defendants raised several affirmative defenses including that the Program was believed by them to be true, a fair and accurate report of public and official proceedings and published in good faith, without malice, and that the Program was privileged under the First and Fourteenth Amendments to the United States Constitution (93a, 107a, 122a). Defendant Lando's answer also alleges as an affirmative defense a privilege regarding the contents of the Atlantic Monthly article because it was necessary and appropriate to defend his reputation against unspecified statements made by plaintiff (108a, 123a).

Discovery

Confronted with the representation on the Program that CBS' report was the result of an investigation in which defendant Lando interviewed "scores of people" over the course of a year (42a), Herbert undertook to discover what defendants did in the course of that investigation, what they were told or learned and what conclusions they came to or beliefs they entertained as to these matters. Fundamental issues currently before this Court arose out of disputes concerning Herbert's discovery efforts in the last area of inquiry.*

The Majority Decision Below

The opinion of Chief Judge Kaufman proceeded from an analysis that divided the functions of the press into three parts. He found the first function—acquiring information—protected by *Branzburg* v. *Hayes*, 408 U.S. 655 (1972) and the third function—dissemination of the information—protected against prior restraints by a line of cases beginning with *Near* v. *Minnesota*, 283 U.S. 697 (1931) (P 4a-8a). He found the second function—processing the information—as embodying the editorial process which had been granted protection in "unequivocal" terms by *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (P 9a). The Chief Judge concluded that the answers sought by the disputed questions "strike to the heart of the vital human component of the editorial process". He determined that, faced with the possibility of "such an inquisition", the editorial process would be chilled and the very values which

* Even the discovery conducted in the other areas has not been free from difficulty. Certain documents were only produced during the course of the depositions; certain interview notes and documents were never produced, based upon the claims that they could not be located or were never prepared (see e.g.: L 77, L 87, L 354, L 482, L 1098); one document was first disclosed only during oral argument before the District Court (163a); and notes of specific conferences between defendants and U.S. Army officials at the Pentagon were never produced.

the *Sullivan* decision sought to safeguard would be consumed (P 22a).

The Chief Judge's opinion never considered the values reflected in the historic right of legal redress for damage to reputation or the effort of *Sullivan* and its progeny to accommodate that right with First Amendment concerns. Nor did the opinion consider the critical distinction drawn by the decisions of this Court between different types of state action—e.g.: prior restraints, criminal sanctions, contempts, civil damage actions for defamation after publication—in determining whether First Amendment rights have been violated. The opinion ignored the reluctance of this Court to create a conditional constitutional privilege of nondislosure of sources in *Branzburg* while citing that decision in support of the creation of an absolute constitutional privilege of nondisclosure of matters concededly in issue in a *Sullivan* libel action. Finally, the opinion assumed that inquiry regarding the defendant's state of mind would chill the desired robust debate on public issues, without any consideration of whether the resulting protection from liability for deliberate liars and those who have serious doubts about the truth of what they say threatens to subvert, rather than enhance, that debate.

In his concurring opinion, Judge Oakes reached the same conclusion as Chief Judge Kaufman "not on First Amendment grounds generally, but in light of what seems to be the Supreme Court's evolving recognition of the special status of the press" (27a). Judge Oakes relied for his conclusion upon a 1974 speech given by Mr. Justice Stewart at Yale Law School and the trends expressed in the decisions of this Court in *Tornillo* and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (P 27a-32a). Judge Oakes proceeded to review what he regarded as the appropriate level of protection for the editorial process in light of the interest of insuring the institutional freedom of the press. He rejected the approach of Judge Haight that *Sullivan*, having struck the

appropriate balance, permitted a plaintiff discovery coterminous with the substantive constitutional law of libel. He found that the *Sullivan* court did not deal with the method of proving actual malice but was involved only in setting forth substantive rules (P 39a-41a). He concluded that to permit discovery of the editorial process would increase "the level of chilling effect" in a way not contemplated by *Sullivan* (P 42a). Finally, Judge Oakes rejected the lower court's position because it failed to acknowledge the special status which the free press guarantee accords to the editorial process (P 43a). Judge Oakes also considered and rejected a compromise approach similar to that which he found had developed in the area of confidential source disclosure, concluding that disclosure of the editorial process in any case would create an unconstitutional chill (P 43a-44a).

As with the Chief Judge's opinion, Judge Oakes' opinion reflected no consideration of either the values embodied in the right of legal redress for damages to reputation or the efforts of *Sullivan* and its progeny to accommodate serious competing social interests. Judge Oakes avoided the critical distinctions arising from different types of state action by treating the discovery sought herein as a prior restraint on publication (P 35a-36a). Judge Oakes also found the absolute privilege of nondisclosure to be a procedural rule not affecting a change in the substantive law of constitutional libel (P 36a, 39a-40a, n.28) and apparently treated the state of mind questions as involving common law malice rather than actual malice (P 41a, n.31).*

* Chief Judge Kaufman's description of the factual setting of this case (P 13a-17a) did not focus on the specific factual areas which gave rise to the state of mind questions. No effort was made to examine the materials discovered and the matters presented on the Program to ascertain whether the disputed questions were directed to defendants' state of mind as to the truth or falsity of published matters or of materials pertaining to those matters. The Chief Judge's description of the Program itself (P 17a-18a), the underlying facts and the course of discovery (P 13a-19a) is inaccurate. While these inaccuracies are not relevant at this stage, the complete failure to analyze the factual framework of the disputed questions can only be explained by the manner in which the majority below chose to approach the appeal (P 11a, n.14; P 25a).

The State of Mind Questions

The questions concerning defendants' state of mind which were the subject of objection at the depositions and of the absolute privilege created by the Court of Appeals related to matters presented on the Program and conflicting or impeaching matters not presented. These questions sought to ascertain whether Lando was subjectively aware of the probable falsity of statements presented on the broadcast by directly ascertaining Lando's state of mind on these matters.*

The effect and importance of the decision below is illustrated by an examination of certain specific matters presented on the Program, conflicting and contradictory facts concerning those matters disclosed during discovery, and questions involving those matters which defendants refused to answer.

Herbert as a Person Capable of Brutality

Prior to the presentation of the Program, Lando had obtained or seen a filmed statement by Cpt. Grimshaw, one of Herbert's company commanders, that Herbert warned him never to have his command involved in any atrocities (Ex. 125, pp. 17, 19; Ex. 60, pp. 44-45); a sworn statement by Cpt. Dorney, another of Herbert's company commanders, that he was constantly being reminded by

* The Courts below described the inquiries regarding defendants' state of mind as falling within five categories (see P 19a-20a; P 57a-58a). Lando also objected to state of mind questions involving the period after the Program but before the publication of the Atlantic Monthly Article. *See, e.g.:* L 2085, l.23 (whether Lando had come to the conclusion during that period that a Cpt. Bill Hill was reasonably sure that Franklin was in Vietnam on February 14).

Herbert to watch out for the safety of the civilian population (Ex. 53; Ex. 50, p. 491); Sgt. Warden's statement that an angry Herbert had spoken to an entire Company condemning the murder of Vietnamese detainees on February 14, 1969 at Cu Loi (Ex. 144; L 2094, L 2095); sworn statements by Brigade Surgeon Laurence Potter and by Battalion Surgeon Tally regarding Herbert's concern for good medical care and treatment of the Vietnamese population (Ex. 51, p. 2; Ex. 52; Ex 50, pp. 483-486; L 877-878); helicopter pilot Kahili's statement about Herbert's briefing to pilots not to shoot Vietnamese civilians or detainees and describing Herbert's humane treatment of the Vietnamese (Ex. 21, p. 7; L 204; Ex. 48; L 875).

None of these statements was quoted, presented or referred to on the Program. Instead, the Program presented a filmed statement by General Barnes that "[Herbert] was a killer" (43a) and a comment by Wallace that there are men "who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself" (53a). Wallace proceeded to present or describe statements from three soldiers, Mike Plantz, Bob Stemmies and Bruce Potter, painting a picture of Herbert as a brutal man (53a-55a). During discovery it was disclosed (a) that Plantz' story was not supported in any manner by anyone and that a number of people had advised Lando that Plantz could not be trusted and had it in for Herbert (L 569, L 570, L 257, L 371-372, L 575, L 583-584); (b) that Lando had specifically noted that Stemmies' story had to be checked regarding whether Herbert had actually witnessed the beating involved, but he never spoke with Stemmies again and another soldier in the Brigade subsequently indicated to Lando that Herbert could not have seen the beating (L 917; Ex. 13, p. 7); and (c) that Lando lacked any corroboration whatever of any aspect of Bruce Potter's story.

Having discovered these facts, plaintiff then asked Lando at his deposition questions concerning his conclusions, bases and intentions for pursuing, presenting and endorsing statements portraying Herbert as a brutal man, insensitive to the atrocities committed against the Vietnamese, while ignoring and excluding all statements describing Herbert as concerned about the treatment of the Vietnamese population and outraged about atrocities. For example, questions which were objected to included: whether Lando concluded it was unnecessary to talk to Capt. Laurence Potter (L 666, l.20); the basis of including in the Program a statement by Plantz regarding Herbert's treatment of the Vietnamese and not including a statement by Kahili on the same subject (L 876, l.19); the basis on which Lando did not include in the Program the statements of Cpt. Potter or Major Talley or Cpt. Dorney (L 878, l.19); whether by not including Cpt. Grimshaw's filmed statement that Herbert cautioned him not to get himself or his command involved in incidents like the February 14th incident, Lando intended to influence the impression created by the Program as to whether Herbert was concerned about war crimes or atrocities while he was in Vietnam (L 1790, l.17); whether Lando had concluded that Herbert's advice to one of his company commanders not to ever get involved in an atrocity was not important on the question of Herbert's concern about war crimes while in Vietnam (L 1791, l.21); whether Lando had proposed including any statement on the Program that some soldiers in the Brigade said Herbert showed care and consideration for the treatment of Vietnamese prisoners (L 877, l.12).*

These unanswered questions become even more significant to plaintiff's effort to discover evidence that would satisfy his heavy burden of proof of actual malice when they are viewed within the context of two statements made by defendant Wallace. A month prior to the Program,

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* While the Program never hints that CBS' investigation uncovered anything showing Herbert's consideration for the treatment of Vietnamese prisoners or his activities condemning atrocities, Wallace noted on the Program that several men said "it's not so" in reference to the claim that Herbert himself could be brutal with captured enemy prisoners (53a).

Wallace, at the Pentagon and in front of one of its officers, suggested to Lando that the Program should attempt to portray Herbert as a brutal man.* More than three years later, at a deposition in this action, Wallace conceded that he had the impression, before the Program was aired, that Herbert had warned men in his command against the commission of atrocities (W 148-149). Within the context of matters plaintiff had discovered regarding the nature of defendants' "investigation", and what they had learned and heard during that "investigation", plaintiff was seeking by the disputed questions direct proof of the critical issue of whether CBS and its producers Lando and Wallace entertained serious doubts or deliberately lied concerning the truth of matters stated and presented on the Program picturing Herbert as a brutal man.

Herbert's Reporting of War Crimes

During discovery plaintiff for the first time became aware that CBS had had in its posession before the Program was aired two sworn statements given by Captain Jack Donovan, one of Herbert's staff officers, which stated that Donovan was certain Herbert had complained of the Cu Loi killings to Brigade Headquarters (Ex. 83 and 84). In the first statement Donovan swore he was certain the report by Herbert was made to Franklin; in the second statement, given after the Army CID called him back, Donovan stated he could not be absolutely certain it was Franklin to whom Herbert was talking, but believed it to be him. In both statements Donovan was unequivocal that he heard Herbert complain at Brigade Headquarters of

* Wallace stated: "ideally, if we can get somebody on the film to say 'I don't know whether he [Herbert] reported but he is capable of doing that sort of thing himself.'" This conversation was tape-recorded by the Pentagon and produced as Ex. A-7 by the Department of Army at the deposition of its Information Officer, Col. Leonard Reed, in this action. Other exhibits produced at the Reed deposition are referred to herein as "Ex." followed by the prefix "A-" and the exhibit number. *Also see:* W 25.

the Cu Loi killings to a Brigade officer. In a second filmed interview conducted by Lando, Col. Franklin admitted that he could not explain the Donovan statements (Ex. 102, p. 13). In that interview Franklin admitted he frequently would "tune-out, turn-off" when Herbert was talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnam Army) or American advisors about the mistreatment of the Vietnamese (Ex. 102, pp. 2, 8).*

On the Program, nothing from Franklin's second interview was noted or excerpted;** rather, the Program presented from Franklin's first interview his assertion that Herbert never discussed war crimes or atrocities with him (45a). Similarly, nothing on the Program even remotely implied that defendants had any statements of anyone who heard Herbert report the Cu Loi killings to Brigade Headquarters; to the contrary, Wallace specifically stated on the Program that none of the men who served under Herbert in Vietnam "were certain that he had actually reported" the February 14th killings (48a).

Plaintiff sought to obtain direct evidence of defendants' state of mind as to the truth or falsity of these matters concerning Herbert's reporting of war crimes which either appeared on the Program or contradicted material which was broadcast by inquiring as to Lando's conclusions regarding Franklin's second interview, particularly in reference to matters presented on the Program (L 1486, l.12; L 1525, l.18; L 1526; l.17; L 1530, l.22); his view of Franklin's veracity and credibility (L 2888, l.18; L 2889, ll.5 and

* The February 14 killings at Cu Loi involved South Vietnamese forces accompanied by an American advisor.

** Apparently, the Program's viewers were not the only ones deprived of all information concerning the second interview. At his deposition Wallace testified that he did not recall knowing about a second Franklin interview prior to the institution of this action (W 89-90). Herbert knew nothing of this interview until it was disclosed during discovery.

16), and his intentions in excluding from the Program any reference to the Donovan statements (L 1138, l.18; L 1139, l.2; L 1139, l.10).

The Role of the Department of the Army in the Preparation of the Program

During discovery plaintiff also learned of extensive cooperation between the defendants and the Pentagon in the preparation for the Program. It was disclosed, for example, that when CBS sought the Army's assistance in locating people to be interviewed, Pentagon and other Army officers spoke to active-duty men and urged them to cooperate with CBS' interview requests. Lando also admitted his knowledge of the Pentagon's extensive animosity toward Herbert which had even included the organizing of an anti-Herbert "briefing team" which toured Army bases during 1972 (L 521, L 2012-2013, L 2015). During the deposition of Col. Reed, an Army Memorandum was produced describing the Army's Information Office as "assisting CBS in the production of this program", and stating that "the thrust of this program will be to point out that much of what Herbert has printed in his book is fiction rather than fact" (Ex. A-8).

Moreover, during the pendency of the Rule 37 motion and the ensuing appeals, Herbert, in a Freedom of Information Act suit,* ascertained that prior to CBS developing its "investigation," Lando told the Pentagon's Information Officer that Lando's premise was that Herbert was a liar and that there would be no story if Herbert's

* The suit was instituted in the District Court for the District of Columbia to obtain unexcised copies of certain documents. (*Herbert* v. *Department of the Army*, D.C.C., Civ. Action No. 77-0155). The three documents which are described herein were produced and filed by the United States Attorney in that proceeding. These documents were annexed as Exhibits I, II and III to the Brief of Plaintiff-Appellee before the Court of Appeals and are similarly annexed to this Brief. Judge Oakes refers to these documents at P 40a-41a, and n.30.

account could not be "debunked" (Ex. I). Thereafter, at the time of his first interview with Franklin in the Pentagon, Lando repeated his interest in debunking Herbert and further told the Information Officer that Wallace "is equally convinced that the story is in debunking Herbert" and that the story "will not go unless he can convincingly portray Herbert as the bad guy" (Ex. II). Lando later stated to General Sidle of the Pentagon Information Office that his "piece is aimed at debunking Herbert in his long fight against the Army" (Ex. III). These conversations were not disclosed by either Lando or Col. Reed at their depositions.

The Army's relationship to the preparation of the Program and its activities regarding Herbert were disregarded on the Program except for a denial by Cpt. Grimshaw that he was under any pressure from Pentagon representatives to appear at the Pentagon for a CBS interview.* Again, in an attempt to obtain direct evidence as to Lando's state of mind regarding the truth or falsity of materials presented on or contrary materials excluded from the Program, plaintiff inquired of Lando as to his consideration of, or belief concerning the impact of, including a reference in the Program to Army activities regarding Herbert's charges (L 523, l.20; L 525, l.12), his conclusions as to Army activities regarding the preparation of the Program (L 1900, l.17; L 2014, l.8; L 2013, ll.8 and 21) or regarding Herbert's charges of war crimes (L 2453, l.5; L 2454, l.8); his views of the veracity of Pentagon representatives (L 2891, ll.6 and 13), his intention in excluding from the Program any reference by Grimshaw to his discussions with Pentagon officers or to feeling any pressure to support the Army's position (L 1905, l.23; L 1907, l.15).

* Grimshaw also stated at his interviews that he knew that there were people at the Pentagon who even then "do not like" what he had previously said in support of Herbert (Ex. A-7), and that he felt some pressure from having been told by another major he was "dead careerwise" because Herbert had published in his book a Grimshaw statement supporting Herbert (Ex. 60, pp. 85-86).

State of Mind Questions Answered by Defendants Without Objection.

Inquiry into the area of state of mind did not uniformly provoke objections by defendants on the basis of a threat to freedom of the press or an attack on a privileged activity of editorial judgment. Indeed, defendants answered a number of questions which clearly come within one or another of the five categories of inquiries which defendants ultimately claimed were privileged from discovery. For example, Lando testified to: defendants' thoughts in deciding not to have a final interview of James Wooten, a New York Times correspondent who collaborated with Herbert in the writing of Herbert's book "Soldier" (L 125-126); Lando's proposals, and his discussions with Wallace, as to whether to include in the Program a comment concerning the fact that Col. Franklin was subsequently relieved from command after a Vietnamese body had been dropped on a command post by soldiers under his command (L 164-165, L 302-305); his conclusion that it was a "toss-up" as to whether the reduced rate on the Hotel Ilikai bill for February 14, 1968 indicated one-person occupancy of the room on that date or an early check-out rate (L 350-351); his conclusion that the statements of Col. Nicholson and Major Crouch as to when Mrs. Franklin departed from Hawaii were inconsistent (L 353); his having no conclusion one way or the other as to whether Donovan believed it was Franklin to whom Herbert was reporting at Brigade headquarters as described in the Donovan statements (L 1103); his discussions with Wallace and the conclusion reached by both of them as to whether the Hotel Ilikai bill had been paid in full when the final figure of the bill recited a balance due of $25.00 (L 1321-1323).* In addition, no objections were made to the pro-

* *Cf.* Chief Judge Kaufman's statement that "Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill" (P 16a). However, on the face of the two documents (Exs. 26 and 98), it is indisputable that a $25.00 balance remained after crediting the amount of the check.

duction of any documents on the basis of any alleged invasion into the editorial process notwithstanding the presence of what now might be characterized as state of mind matter in a number of the documents.*

Summary of Argument

In *Sullivan* and its progeny this Court sought to accommodate the interests of the First Amendment in uninhibited, robust and wide-open debate on public issues with the historic right of legal redress for damage to reputation from defamatory falsehood. In striking the balance between these competing interests, this Court concluded that the calculated or reckless falsehood was constitutionally worthless and not deserving of any constitutional protection and declared that public officials, and, thereafter, public figures, could recover damages for defamatory falsehoods where it was proven by clear and convincing evidence that they were published with knowledge of their falsity or with reckless disregard of whether they were false or not. Reckless disregard refers to a subjective state of mind of the defendant in which he entertains serious doubts as to the truth of the publication or has a subjective awareness of its probable falsity. The libel plaintiff cannot establish reckless disregard under the *Sullivan* principles without the requisite clear and convincing proof of this state of mind.

The decision below has created an absolute privilege for nondisclosure of the editorial process which prevents plaintiffs from obtaining any direct evidence of defendant's state of mind (including conclusions, opinions, doubts, intentions) regarding either the false material

* *E.g.:* Ex. 138, p. 2 (Lando note to "double check" with Hill his statement regarding Herbert's reporting the Cu Loi killing to Brigade); Ex. 13, p. 7 (Lando note to check with Stemmies whether Herbert had actually witnessed a beating that Stemmies had described).

published or the facts withheld from the final product which contradicted or cast doubt upon the published assertions. The decision also threatens to eliminate certain kinds of indirect or circumstantial evidence if they involve matters subsumed in the editorial process. Whether this privilege is labelled procedural or substantive is not the issue—its impact is to effectively prevent *Sullivan* plaintiffs from proving a critical part of their case under the reckless disregard branch of actual malice. The privilege is in conflict with legal principles that treat with great disfavor any rules that limit the full disclosure of all the facts and that prevent a party from raising a defense, on the one hand, and asserting a privilege not to disclose facts regarding that defense, on the other hand. Moreover, the privilege creates a potential anomaly because only the plaintiff, but not the defendant, would be barred from this proof.

The privilege established by the Court of Appeals has immunized an entire area of media activity—the editorial process—from judicial scrutiny at both pre-trial and trial stages of a defamation action. It has thereby removed from exposure to liability for calculated or reckless falsehood any activity arising during the editorial process, a term which, by its very nature, is difficult to define. Such a privilege may reach far beyond the field of defamation to immunize the editorial process from judicial scrutiny in areas where the media have traditionally been subject to statutes of general application.

The creation of an absolute privilege for editorial judgment is not supported by this Court's decisions concerning governmental attempts to control what shall or shall not be printed. The nature of the state action, and not the particular media function as such, will normally determine the level of protection required to secure First Amendment rights. *Sullivan* and its progeny have defined the level of protection required where the state action is a post-publication defamation suit for damages.

The confidential source cases do not create a privilege of nondisclosure in libel actions. The First Amendment concerns implicated in discovery matters can be and are properly addressed without the creation of any privilege of nondisclosure.

Creating a privilege for the editorial process grounded upon a structural analysis of the Press Clause threatens to elevate the rights of the institutional media above the rights of all others protected by and performing functions within the Free Press and Free Speech Clauses. Such an approach is not firmly supported by history or precedent. It threatens to involve courts in improper value judgments concerning the scope of the privilege as well as who is entitled to claim it. The granting of special status to the institutional press would signal a ranking of First Amendment priorities contrary to the fundamental concept of freedoms proclaimed by that Amendment.

ARGUMENT

POINT I

The Creation of an Absolute Privilege of Nondisclosure of Editorial Judgment and the Constitutional Immunization of the Editorial Process Has Fundamentally Changed the Principles of *New York Times* v. *Sullivan* and Its Progeny.

A. *The Accommodation of Competing Social Values From* Sullivan *to the Present and the Placing of the Calculated or Reckless Falsehood Outside the Ambit of Constitutional Protection.*

The decisions of this Court from *Sullivan* on represent a continuing effort to fashion principles that balance the competing social interests expressed in the First Amendment protections of freedom of speech and press and in the historic recognition of the right of legal redress for

persons damaged by false and defamatory publications.* The issue was resolved in *Sullivan* by establishing for those sued for defamation by a public official a "defense for erroneous statements honestly made," *id.* at 278, a defense which requires the plaintiff to prove that the false and defamatory statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . ." *id.* at 279-280.

This rule of *Sullivan* reflected and continues to reflect this Court's effort to balance these competing societal interests. Mr. Justice Stewart, in *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 270 (1971), noted that the *Sullivan* rule "was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation." In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 342 (1974), Mr. Justice Powell wrote of the Court's "continuing effort to define the proper accommodation between these competing concerns" of freedom of speech and press and the values served by the law of defamation. In *Time, Inc.* v. *Firestone,* 424 U.S. 448, 456

* In *Sullivan,* Mr. Justice Brennan pointed to the great debate over the Sedition Act as crucial to a contemporary understanding of the central meaning of the First Amendment. 376 U.S. at 273-275. The focus of that debate was the Act's provisions for criminal prosecution of libel against government. Within that debate, the compatability of a free press with a civil action for damages to redress injury to reputation was recognized by even the staunchest critics of the Act. *See, e.g.:* Tunis Wortman, *A Treatise Concerning Political Enquiry,* 1800; George Hay, *An Essay on the Liberty of the Press,* 1799; St. George Tucker, *Tucker's Blackstone,* 1803; *all reprinted in part in:* L. Levy, Freedom of the Press From Zenger to Jefferson 230-284, 186-197, 318-326 (1966). In considering the salutory role of the civil libel action, concerns which continue to this day were noted: "There are two opposite extremes of Error to which the Press is liable to be perverted. The one, an interested partiality towards the Government; the other, a wanton or designing misrepresentation of its measures. In each of these cases the Press may be considered as Licentious . . . ***Civil prosecutions, at the suit of injured individuals, are a sufficient restraint upon the licentiousness of the Press." Wortman, *op.cit.,* 274, 281.

(1976), Mr. Justice Rehnquist described the values in conflict as "the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances."*

The post-Sullivan cases expressly recognize the fundamental interests reflected in the law of defamation. Thus, in *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 (1966) Mr. Justice Brennan noted society's "pervasive and strong interest in preventing and redressing attacks upon reputation." In *Gertz,* Mr. Justice Powell quoted Mr. Justice Stewart's statement in *Rosenblatt,* 383 U.S. at 92, that the individual's right to the protection of his own good name

> reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.**

* Lower Courts have also treated the *Sullivan* principles as an attempt to balance these basic interests. *See e.g.: Mahen* v. *Hughes Tool Co.,* 569 F.2d 459, 479-480 (9th Cir. 1977) ("It is important to safeguard First Amendment rights; it is also important to give protection to a person who is intentionally and maliciously defamed, and to discourage that kind of defamation in the future. A balance must be struck between those two competing interests.").

** *Also see: Afro-American Publishing Co., Inc.* v. *Jaffe,* 366 F.2d 649, 660 (D.C. Cir. 1966) (*en banc*) ("The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes."); *Reliance Insurance Company* v. *Barron's,* 442 F.Supp. 1341, 1359 (S.D.N.Y. 1977).

Recognition of society's interest in reputation is, of course, not limited to Court decisions. *See, e.g.:* Proverbs 22:1: "A good name is rather to be chosen than great riches"; Shakespeare, *Othello,* Act 3, Scene 3:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls;

If the interest in affording legal redress to persons whose reputation and name have been damaged by defamatory falsehood did not represent an important social value then there would have been less* need to strike a balance which permits public officials and public figures to seek legal redress where the defamatory falsehood is published with actual malice. In *Gertz* Mr. Justice Powell wrote:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .

(418 U.S. at 341; citations omitted)

> Who steals my purse steals trash; 'tis
> something, nothing;
> 'Twas mine, 'tis his, and has been
> slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

* There remains the role that damage actions for calculated and reckless falsehood do play in protecting the robust debate described in *Sullivan* for, as Mr. Justice Stewart warned in *Rosenblatt, supra,* "the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. at 94.

This statement is peculiarly apposite to the decision below where an absolute privilege of editorial judgment was created without any recognition of the societal interest in a person's reputation, good name or integrity.*

The particular balance struck by this Court rests upon the recognition that the calculated or reckless falsehood has no place in the sanctuary of the First Amendment. As stated by Mr. Justice Brennan in *Garrison* v. *Louisiana,* 379 U.S. 64, 75 (1964):

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any ex-

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* Indeed, Chief Judge Kaufman described the issue before the Court of Appeals as "the fundamental relationship between the First Amendment guarantee of a free press and the teaching of *New York Times* v. *Sullivan*" (P 3a). Apparently, the efforts represented by *Sullivan* and its progeny to strike a balance between competing social values were not recognized by the majority opinions below.

position of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 86 L. ed. 1031, 1035, 62 S Ct 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Also see: Pickering v. *Board of Education,* 391 U.S. 563, 583 (1968) (White, J., concurring in part): "Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment."

In finding that false, but not dishonest, speech must be protected in order to assure "uninhibited, robust and wide-open" debate on public isues, *Sullivan* reasoned that a contrary rule would dampen the vigor and limit the variety of public debate by deterring those who believed the truth of their criticism but doubted whether it could be proved in court, 376 U.S. at 279. The "erroneous statement of fact", noted Mr. Justice Powell in *Gertz,* 418 U.S. at 340, is "inevitable in free debate." No similar conclusion is applicable to the calculated falsehood. Free debate does not require for its existence participants who know that their statements are false or who publish their defamatory misstatements with reckless disregard of whether they are false or not.* Nor will anyone who believes in the truth of his statement be deterred from joining in debate on public issues out of fear that the statement may ultimately be false or its truth unprovable because it is only the in-

* Mr. Justice White in *St. Amant* v. *Thompson,* 390 U.S. 727, 732, 731 (1968), reaffirmed "the line which our cases have drawn between false communications which are protected and those which are not" and described "deliberate falsification" and statements made where the defendant "entertained serious doubts as to the truth of his publication" as falling outside the protected area. *Cf:* Judge Meskill's statement below that "The publication of lies should be discouraged." (P 46a)

tentional lie and statements made with reckless disregard of their falsity which are not afforded First Amendment protection.* In essence, the balance of competing social interests struck by *Sullivan* and its progeny rests upon the two-fold conclusion that the intentional lie and the recklessly false statement are not of constitutional value and that placing these statements outside the orbit of constitutional protection does not realistically inhibit or dampen the robust debate on public issues to which we have a "profound national commitment." *Sullivan,* 376 U.S. at 270.**

B. *The Subjective State of Mind Test of Reckless Disregard and the Heavy Burden of Proof Imposed Upon the Plaintiff.*

In determining whether a publisher made a defamatory statement with reckless disregard of whether it was false, this Court has prescribed a subjective test directed at the state of mind of the publisher. In *Garrison, supra,* 379 U.S. at 74, Mr. Justice Brennan described the required state of mind as one where the defendant has made the false statements with a "high degree of awareness of their probable falsity"; in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), Mr. Justice Harlan described it as "the publisher's awareness of probable falsity"; Mr. Justice White in *St. Amant, supra,* 390 U.S. at 731 wrote of the required state of mind as one where the publisher "entertained serious doubts as to the truth of his publication"; and, finally, the subjective nature of the test was noted in

* *See: Appleyard* v. *Transamerican Press, Inc.,* 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977).

** "The right of free public expression does include the right to be in error. Liberty is experimental. Debate itself could not exist unless wrong opinions could be rightfully offered by those who suppose them to be right. But the assumption that the man in error is actually trying for truth is of the essence of his claim for freedom. What the moral right does not cover is the right to be deliberately or irresponsibly in error." The Commission on Freedom of the Press, A Free and Responsible Press 10 (1947).

Mr. Justice Powell's statement in *Gertz, supra,* 418 U.S. at 334 n. 6, that *St. Amant* "equated reckless disregard of the truth with subjective awareness of probable falsity. . . ."

When this Court determined that the balance of competing social interests should be struck so as to continue to exclude from First Amendment protections the knowing or reckless falsehood, it also imposed upon public official plaintiffs the burden of proving actual malice by clear and convincing evidence. *Sullivan,* 376 U.S. at 285-286. While there has been a shifting definition of the class of plaintiffs subject to the principles of *Sullivan** in the 14 years since that decision, there has been no indication by this Court that the heavy burden of proof of reckless disregard was also to be accompanied by a prohibition of direct proof of the subjective state of mind required to establish reckless disregard.

C. *The Impact of the Absolute Privilege Created by the Court Below Upon a* Sullivan *Plaintiff's Ability to Prove Actual Malice.*

A new and monumental burden has been placed upon plaintiffs seeking to prove the liability of a defendant for publishing with a state of mind outside First Amendment protections. The subjective nature of the state of mind requisite to establishing actual malice means defendant alone is normally the only source of direct evidence on that issue. To deprive plaintiffs of the opportunity to discover from defendant direct proof on the critical issue which plaintiffs must prove by clear and convincing evidence is to fatally tilt the balance in *Sullivan* libel cases in favor of defendants. In the District Court Judge Haight wrote

* *Compare: Curtis Publishing Co.* v. *Butts, supra; Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc., supra; Time, Inc.* v. *Firestone, supra.*

> If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result. (P 62a-63a)*

The substantial impact of this prohibition on discovery is illustrated by consideration of a few of the state of mind matters which were disclosed during discovery in the instant case. Wallace's statement urging Lando to find for the Program someone to say Herbert was capable of committing atrocities himself (W 25; Ex. A-7; *see* p. 12, *supra*);** Lando's note to check Stemmies as to whether Herbert had witnessed the beating (L 917; Ex. 13, p. 7; *see* p. 10, *supra*); Lando's statement regarding the inconsistency between Nicholson and Crouch as to when Mrs. Franklin left Hawaii (L 353; *see* p. 16, supra);*** Wal-

* After the decision below, Judge Brieant wrote in *Reliance Insurance Company* v. *Barron's, supra,* 442 F. Supp. at 1359: "In light of *Herbert,* and in view of the recent denial by the Supreme Court of *certiorari* in *Hotchner* v. *Castillo-Puche,* 551 F.2d 910 (2d Cir.), *cert. denied,* 46 U.S.L.W. 3202 (October 4, 1977), practical litigants may well conclude that any remedy for libel against a journalist by a public figure is now illusory."

** In regard to proof of this statement by a tape recording taken by a third party, if the absolute privilege of editorial judgment conferred upon the press by the decision below follows other testimonial privileges, then the press could argue that third party disclosure could not be properly made without its consent. *See e.g.: Republic Gear Co.* v. *Borg-Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967).

*** While Lando's notes of his Nicholson and Crouch interviews reflect the inconsistency of their stories on this matter, the issue of whether Lando believed that their statements were inconsistent could only be directly proved by his own statement.

lace's statement that he had the impression before the Program that Herbert had warned men in his command against the commission of atrocities (W 148-149; *see* p. 12, *supra*); Lando's statements to the Department of the Army that the purpose of the Program was to "debunk" Herbert and there would be no Program unless he can portray Herbert as the "bad guy" (Exs. I and II, *see* p. 15, *supra*)*— are all types of statements which could be barred in the future from discovery. Thus, critical aspects of proof ascertained in discovering a defendant's activities in preparing a story for publication and bearing directly on that defendant's state of mind as to whether he entertained serious doubts as to the truth of matters contained in the publication would be legally concealed from the defamed plaintiff.

Judge Oakes noted that the decision below may deprive plaintiff of "adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (P 41a, n.31).** However, the absolute privilege created by the Court of Appeals encompasses the reporter's state of mind on the truth or falsity of matters published as well as his own views of the plaintiff. Indeed, in the case at bar the state of mind questions which were objected to by defen-

* As to the admissibility of these statements contained in documents produced by a third party see footnote **, p. 27, *supra*.

** While common law malice differs from actual malice, such common law malice elements as motive and ill-will can constitute some evidence from which actual malice may be inferred. *See: Curtis Publishing Co.* v. *Butts, supra*, 388 U.S. at 156, n.20, 158 (evidence that Saturday Evening Post was anxious to publish an exposé); *Goldwater* v. *Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) ("There is no doubt that evidence . . . of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inference, the fact of a defendant's recklessness or of his knowledge of falsity."); *Sprouse* v. *Clay Communications, Inc.*, —— W.Va. ——, 211 S.E. 2d 674, 681-683, 688 (Sup.Ct. of Appeals, W.Va. 1975), *cert. denied*, 423 U.S. 882 (1975). *See* Judge Haight's examination of the permissible relationship between evidence of negligence, motive and intent and the ultimate proof which the libel plaintiff must adduce to show actual malice (P 64a-67a).

dants (*see* pp. 11, 13-14, 15, *supra;* 185a-188a; 130a-131a), as well as those which were answered without objection (*see* pp. 16-17, *supra*), focus on defendants' awareness and doubts as to the truth or falsity of materials concerning matters presented on the Program. This is the state of mind of defendant which is at the core of the subjective test of reckless disregard. *See: Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974).*

While prohibiting plaintiff's proof of defendants' state of mind, the decision below apparently does not prevent defendants from testifying themselves as to their conclusions, the basis for those conclusions and their intentions when they believe such testimony would be helpful to their case. In fact, from *Sullivan* to the present, libel defendants have shown no reluctance to disclose their state of mind under such circumstances. *See e.g.: Sullivan*, 376 U.S. at 286 (testimony of New York Times' Secretary that he "thought" the advertisement was substantially correct); *Gertz*, 418 U.S. at 328 (magazine editor's affidavit stating reliance on author's reputation and prior experience with accuracy of other articles written by author); *Carson* v. *Allied News Co.*, 529 F.2d 206, 211-212 (7th Cir. 1976) (reporter's deposition testimony on "basis" for certain statements in the article); *McNair* v. *The Hearst Corporation*, 494 F.2d 1309, 1311, n.2 (9th Cir. 1974) (publisher's deposition testimony on the "impression" created by the article); *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971), *cert. denied*, 404 U.S. 864 (1971) (deposition testimony as to reporter's belief in plaintiff); *Pauling*

* At an earlier point in his concurrence, Judge Oakes had conceded that under Sullivan "the editor's state of mind, not vis-a-vis the plaintiff, but vis-a-vis the truth or falsity of what is being published about the plaintiff, is a proper focus of inquiry" (P 38a, n.26). The possible ramifications of this concession were avoided when Judge Oakes apparently viewed the state of mind questions as bearing on common law malice, rather than the actual malice of *Sullivan* and its progeny (P 41a, n.31). The District Court did not view the disputed questions in this manner (P 59a-61a; P 64-67a).

v. *Globe-Democrat Co.*, 362 F.2d 188, 198 (8th Cir. 1966) (deposition testimony by defendant's editor that they "felt" plaintiff was about to be cited); *MacNeil* v. *Columbia Broadcasting System, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975); *F&J Enterprises, Inc* v. *Columbia Broadcasting Systems, Inc.*, 373 F.Supp. 292, 298 (N.D.Ohio 1974); *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005, 1008-1010 (M.D.Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970).*

Judge Oakes' comment that "free press principles . . . are being applied to limit a procedural rule, not to alter the substantive law of libel" (P 40a, n.28) misperceived the issue. Whether the privilege is described as procedural or substantive, the real issue is its impact on the substantive area of liability for defamation declared by *Sullivan* principles to be outside constitutional protection. Where the means of proving a particular matter required for liability have been effectively foreclosed, then the principle of liability itself has been nullified. As noted by Edmund Burke many years ago: "to refuse evidence is to refuse to hear the cause." 1794, Mr. Edmund Burke, Report to the House of Commons, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl. Hist. 324, quoted in I *Wigmore on Evidence* §10, p. 294

* Significantly, not until the present case have *Sullivan* defendants claimed a need to protect the editorial process from disclosure. A concern that the exercise of First Amendment rights might be chilled was never heard when publishers were making such disclosures to show an absence of actual malice; only when such disclosure could have furnished critical aid to a plaintiff in establishing that the defamatory statements fell outside any constitutional protection did a First Amendment claim arise. *See* Judge Meskill, dissenting: "It seems to me that if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now." (P 51a) *Cf. Branzburg, supra*, 408 U.S. at 698: "We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958."

(3d Ed. 1940). More recently, we have been instructed that the creation of a privilege which prevents the obtaining of direct evidence on a basic issue in a judicial controversy cannot lightly be reduced to a mere procedural matter. In *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974), the Chief Justice wrote:

> . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
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> • • •
>
> . . . Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.*

The decision below also alters particular evidentiary principles which prevent a party from depriving the ad-

* Both Chief Judge Kaufman (P 12a, n.16) and Judge Oakes (P 36 and n.23, n.24) suggest that procedural rules may be refashioned in light of First Amendment interests. However, other than the rules of independent appellate review and the heavier burden of proof enunciated in *Sullivan* itself, 376 U.S. at 285 and n.26 and 285-86, it would be inaccurate to conclude that courts have treated the *Sullivan* principles as calling for alteration of rules of procedure. *See e.g.: Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438, 442 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974) (the usual rules apply in determining whether a case should go to a jury); *Goldwater* v. *Ginzburg, supra*, 414 F.2d at 337-38, n.21 (usual principles governing summary judgment apply in libel cases); *Stearn* v. *McLean-Hunter Limited*, 46 F.R.D. 76, 80-81 (S.D.N.Y. 1969) (the usual pleading of malice called for by Rule 9(b), F.R.C.P., applies to *Sullivan* libel action); *Arizona Biochemical Co.* v. *Hearst Corporation*, 302 F.Supp. 412, 417 (S.D.N.Y. 1969) (same). In any event, the decision below creates a rule that is profoundly more than procedural both in its nature and ramifications.

versary of evidence or information necessary to defend or prove a claim put in issue by that party. In a libel action, the media defendent places the First Amendment *Sullivan* standard in issue by way of an affirmative defense to the claims asserted (*see, e.g.*: 93a, 107a, 122a). As noted by the District Court:

> . . . defendants deny knowledge of any falsity that may be present, or that they proceeded with reckless disregard of truth or falsity. Thus defendants, as they are of course entitled to do, cast upon Herbert the onerous burden of proof that applies in cases of this nature. . . . (P 56a).

Central, of course, to that defense is the absence of that state of mind unprotected by *Sullivan* law. Yet, under the absolute privilege now formulated for editorial judgment matters, media defendants may deprive the libel plaintiff of information concerning the very state of mind which their defense asserts protects them from liability. The law has traditionally recognized that a party asserting a privilege impliedly waives it where, through some affirmative act, he has made the privileged matter relevant to the case. In *Hearn* v. *Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), the Court rejected defendants' claim of attorney-client privilege where plaintiff sought discovery concerning their defense of good faith immunity. The Court reviewed the settled rules concerning waivers of the privilege:

> [D]efendants assert the [attorney-client] privilege in aid of the affirmative defense that they are protected from liability by a qualified immunity. Therefore, all the elements common to a finding of waiver are present in this case: defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raised; and one result of asserting the privilege has been to deprive plaintiff of information necessary to "defend" against defendants' affirmative defense, for the protected information is also germane to plaintiff's burden of proving malice or unreasonable disregard of his clearly established constitutional rights.

Cf. Anderson v. *Nixon*, 444 F.Supp. 1195 (D.D.C. 1978) (damage action by columnist required disclosure of his confidential sources during pre-trial discovery); *Haynes* v. *Smith*, 73 F.R.D. 572, 577 (W.D.N.Y. 1976) (affirmative defense of "reasonable belief" that defendant's actions did not infringe plaintiff's constitutional rights constituted implied waiver of attorney-client privilege);* *cf. Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970) (Fifth Amendment). In short, the law does not favor a party's utilization of a privilege as both a sword and a shield regardless of whether it is the First Amendment which is claimed as the source of the privilege or some other right, rule or doctrine.

D. *The Impact of the Constitutional Immunization of the Editorial Process Upon the Liability of the Media.*

By immunizing the editorial process from judicial scrutiny, the decision below threatens to radically change a substantial body of constitutional law. A bar upon inquiry during the discovery stage would undoubtedly apply to the trial itself.** Thus, an entire area of media activity

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* In *Jenoff* v. *Hearst Corp.*, No. H75-692 (D.Md. January 20, 1978) the Court found an express waiver of an editorial judgment privilege where media defendants had answered state of mind questions at depositions held prior to the decision of the Second Circuit herein, but sought the privilege as to questions raised in subsequent depositions held after the decision was announced. In any event, the Court concluded it would not have followed the Second Circuit's decision. Slip opinion, 5-7.

** *See* P 45a, n.38; *compare* Rule 25(b)(1), F.R.C.P., which permits a more extensive attempt to ascertain the facts during discovery than would be permissible at trial. *See also:* P 63a.

has been removed from possible inquiry in a *Sullivan* case,* regardless of whether the inquiry occurs before or at the trial.** Moreover, if inquiry into the editorial process is not to be countenanced because of First Amendment concerns, then it follows that any judicial "intrusion" on that process, including a defamation action which centers upon what happened during the "transform[ation of] the raw data of reportage into a finished product" (P 9a), will be prohibited. In this day of documentaries, in-depth studies, and investigatory reports, the scope of media activity which has been thus removed from possible liability under *Sullivan* is substantial.***

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* The contours of this protected area of activity are at least, in the word of Judge Oakes, "vague" (P 25a, n.5). Chief Judge Kaufman distinguished the area from the functions of acquiring and disseminating information (P 4a) and Judge Oakes quoted Chief Justice Burger's opinion in *Tornillo, supra* (P 45a). The media, meanwhile, has described the area as "begin[ning] when a news organization first decides to look into a subject and continu[ing] until the finished product appears in print or is broadcast." *The New York Times*, "Libel Case Against CBS Raises Questions About the Release of Data," November 15, 1977, p. 32 col. 3.

** Despite concern expressed below with the breadth of discovery conducted in this case (P 19a) and the "untrammeled, roving discovery that has become so prevalent" (P 25a), the absolute privilege created by the decision is clearly not limited to pre-trial procedures.

*** The present case does not involve "the accurate disinterested reporting" of charges against a *Sullivan* plaintiff which was held to be involved in *Edwards* v. *National Audubon Society*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3390 (Dec. 13, 1977). Here, defendants were reporting on the results of their own investigation (42a); espousing their own conclusions and concurring in the charges made by Gen. Barnes and Col. Franklin (*see e.g.:* 48a, 51a, 53a, 56a), and distorting in the Program the matters which they had investigated. As stated by Chief Judge Kaufman in *Edwards:* "a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. *See Goldwater* v. *Ginzburg* [citation omitted]." *Id.* at 120.

Further, the reach of an absolute privilege for editorial judgment extends far beyond a post-publication defamation suit. If the conclusion is sound that First Amendment concerns require absolute protection of the editorial process from disclosure then the decision below has similarly removed this substantial part of the media's activity from judicial scrutiny under statutes and laws long recognized as generally applicable to the media. See e.g.: *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (National Labor Relations Act); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (Fair Labor Standards Act); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (Sherman Anti-Trust Act); *Westermann Co.* v. *Dispatch Printing Co.*, 249 U.S. 100 (1919) (copyright law); *cf. Miller* v. *California*, 413 U.S. 15 (1973) (obscenity laws); *cf. Tuck* v. *McGraw-Hill, Inc.*, 421 F.Supp. 39 (S.D.N.Y. 1976) (Title VII of the Civil Rights Act).

The decision below has thus pronounced a sweeping rule which adversely impacts upon carefully drawn substantive constitutional and legal rights essential to our democratic system. As Mr. Justice Frankfurter cautioned, concurring in *Pennekamp* v. *Florida*, 328 U.S. 331, 350-351 (1946):

> [D]emocracy is the least static form of society. Its basis is reason not authority. Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it.

POINT II

Decisions of This Court Concerning Government Attempts to Direct What Shall or Shall Not Be Printed Are Not Determinative of the Level of First Amendment Protections Required in Regard to Disclosure of the Editorial Process in a Post-Publication *Sullivan* Libel Case.

The foundation of Chief Judge Kaufman's analysis leading to the creation of an absolute privilege is his view that the particular media function in issue, rather than the nature of the governmental or state action, determines the extent of protection required in order to secure the interests of the First Amendment. Starting from that view it is a relatively facile journey through *Tornillo* and *Democratic National Committee, supra,* to the conclusion that the function of editorial process is entitled to absolute protection. Upon examination, however, that analysis collapses.

'An analysis which treats the particular press function as determinative of the level of First Amendment protection is contrary to the decisions of this Court. Indeed, those decisions repeatedly point out that the level of constitutional protection will normally depend upon the nature of governmental regulation sought. This approach received an early full exposition in *Near* v. *Minnesota, supra,* 283 U.S. at 713-715. There, Chief Justice Hughes wrote:

> In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of

> a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889.
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> • • •
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> . . . In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. (footnote omitted)

In *Tornillo,* Chief Justice Burger for the majority, wrote that what was at issue in that case was governmental compulsion upon a publisher "to print that which it would not otherwise print." *Id.* 418 U.S. at 256. Such compulsion, the Chief Justice noted, "operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." *Id.* The significance of distinctions based upon the particular nature of the government action was noted in an earlier passage of the Chief Justice's opinion:

> The Court foresaw the problems relating to government-enforced access as early as its decision in Associated Press v. United States, supra. There it carefully contrasted the private "compulsion to print" called for by the Association's bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U.S. at 20 n 18. 89 L Ed

> 2013. In Branzburg v. Hayes, 408 U.S. 665, 681, 33 L Ed 2d 626, 92 S Ct 2646 (1972), we emphasized that the cases then before us "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."
>
> *Id.* at 254-255.

The concurring opinions in *Tornillo* further underline the fact that that decision turned upon the attempt of government to compel the media to publish what it otherwise would not, rather than any conclusion that the editorial process was immune from all state action including post-publication scrutiny in a *Sullivan* libel suit. Mr. Justice Brennan, with Mr. Justice Rehnquist, concurring, specifically stated that the decision "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258. Mr. Justice White, concurring, noted also the jurisprudential rule that "government tampering, *in advance of publication,*" with "news and editorial content" is forbidden by a "virtually insurmountable" First Amendment barrier. *Id.* at 259 (emphasis added). For Mr. Justice White the "constitutionally obnoxious feature" of the law was that it "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." *Id.* at 261. However, there remains an area of post-publication accountability by the press: "But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. . . . Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation." *Id.* And further, "the press certainly remains liable for knowing or reckless falsehoods

under *New York Times Co.* v. *Sullivan* . . . and its progeny, however improper an injunction against publication might be." *Id.* at 262.

Democratic National Committee addressed the issue of whether the federal government could compel the broadcast media to accept paid editorial advertising. The effect of such restraints on the editorial judgment of broadcasters was the focus of the Chief Justice's opinion: "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents." 412 U.S. at 120. Later in the opinion, the Chief Justice wrote: "the question here is . . . who shall determine what issues are to be discussed by whom, and when." *Id.* at 130.*

In *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976)** this Court once again noted the pivotal position of the nature of the state's attempt to interfere with speech or press activity. Chief Justice Burger, writing for the Court, analyzed the long history of First Amendment protections against governmental prior restraints and noted the very different questions posed by state action in the form of post-publication inquiries in a defamation case:

> The thread running through all these cases is that prior restraints on speech and publication are the

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* *Democratic National Committee* also reflected concern that the access there sought would result in a virtual monopoly of editorial advertising time by the financially affluent or by those of one political persuasion. *Id.* at 123.

** After *Tornillo* and prior to *Nebraska Press Assn.* the Court rendered its decision in *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975), in which Mr. Justice Blackmun, for a majority of the Court, succinctly noted the distinction between subsequent liability for published matter and the formidable dangers inherent in "freewheeling censorship" prior to publication: "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."

> most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
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> *Id.* at 559.

Mr. Justice Brennan, concurring, with Mr. Justice Stewart and Mr. Justice Marshall joining, further commented upon the critical relationship between the nature of the state action and the level of protection to be afforded. After stating that "there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained," *Id.* at 588, Mr. Justice Brennan specifically noted the existence of other avenues whereby "shabby" reportage may be challenged:

> Of course, even if the press cannot be enjoined from reporting certain information, *that does not necessarily immunize it from civil liability for libel* or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information. (*Id.* n. 15; emphasis added)*

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*In a footnote responding to the characterization by the Nebraska Supreme Court of petitioners' position as "extremist and absolutist," Mr. Justice Brennan wrote:

> . . . [P]etitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material, . . . Nor does it involve the question of damage actions for malicious publication of erroneous material concerning those involved in the criminal justice system, . . . And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication.
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> (*Id.* at 594, n.20; citations omitted)

As a result of its analytical approach based upon particular media functions, the decision below has rewritten the law of constitutional libel. *Sullivan* and subsequent cases had defined the level of First Amendment protection required when the state action consisted of a post-publication civil case for libel against a public official or public figure. The decision below has now decided that a different and absolute level of protection normally applicable where the state attempts to dictate what should or should not be printed must be imposed in a *Sullivan* libel case upon the effort to discover facts directly relevant to the concededly critical issue of the publisher's state of mind. While *Sullivan* and its progeny have found defamation actions premised upon the actual malice standard to be constitutionally permissible, the Court below has concluded that discovery of direct proof of actual malice is not constitutionally permissible. By relying upon decisions of this Court involving pre-publication governmental action, the Court below has effectively accomplished what a majority of this Court has declined to do for the fourteen years since *Sullivan*—grant an immunity to the media for publications made with a reckless disregard of their truth.*

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* Judge Oakes' treatment of plaintiff's attempt to discover defendants' state of mind in this post-publication libel suit as a prior restraint (P 35a-36a) is not supportable. Every post-publication state action concerning a media activity may be said to present some possibility of being a prior restraint on future activities of the same nature. Thus, Judge Oakes' view would lead to a finding of an impermissible prior restraint whether the state action consists of requiring answers to questions seeking disclosure of the views and doubts of a *Sullivan* libel defendant regarding the truth or falsity of the published materials, or requiring disclosure of confidential sources at a grand jury (*cf. Branzburg*), or, ultimately, permitting a Court action for defamation (*cf. Sullivan*), or invasion of privacy (*cf. Time, Inc.* v. *Hill*, 385 U.S. 375 (1967)), or

POINT III

Confidential Source Disclosure Cases Do Not Require Creation of a Privilege of Nondisclosure of the Editorial Process in Order to Give Proper Consideration to the First Amendment in a *Sullivan* Libel Case.

Chief Judge Kaufman's creation of an absolute constitutional privilege for editorial judgment is said to be based upon this Court's recognition in *Branzburg* v. *Hayes, supra,* that the First Amendment affords some protection to newsgathering (P 7a-8a). While some constitutional deference to this function of the press was recognized in *Branzburg,* this Court did not grant the media a privilege immunizing confidential news sources from disclosure, nor did it suggest that an absolute privilege for any media function or activity would be appropriate.* The Court's opinion could not be clearer:

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appropriation of property (*Zacchini* v. *Scripps-Howard Broadcasting Co.*, —— U.S. ——, 53 L.Ed.2d 965 (1977). *Cf. Landmark Communications, Inc.* v. *Virginia,* —— U.S. ——, 46 U.S.L.W. 4389, 4391 (U.S. May 1, 1978) where Chief Justice Burger noted that a statute providing for post-publication criminal punishment of third persons, including the media, for divulging or publishing information regarding proceedings before a state judicial review commission did not constitute a prior restraint.

*The reporters in *Branzburg* did not even request an absolute privilege against official interrogation concerning confidential sources under all circumstances, but only "until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure." 408 U.S. at 680; *see also: id.* at 702-704. The Court rejected this balancing approach because of the difficulty in predicting when such a privilege was legitimately raised and when not, as well as to whom the cloak of privilege might extend. *Id.* at 702-706. Ironically, Judge Oakes expressed the same concerns over the balancing approach suggested by defendants below for editorial judgment matters, but concluded instead that an absolute privilege was the only appropriate response (P 43a-44a). Several courts which have considered source disclosure claims have observed that no constitutional privilege as described by the Chief Judge below (P 8a) was articulated in *Branzburg. See, e.g.: United States* v. *Liddy,* 354 F. Supp. 208, 213-214 (D.D.C. 1972); *Caldero* v. *Tribune Publishing Co.,* 98 Idaho 288, 562 P.2d 791, 797 (1977) *cert. denied,* 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977); *Ammerman* v. *Hubbard Broadcasting,* 3 Med. L. Rep. 1616, 1622 (N. Mex. Ct. of Appeals 1977), *cert. denied,* —— U.S. ——, 46 U.S.L.W. 3709 (U.S. May 15, 1978).

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.
>
> We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.
>
> (408 U.S. at 689-690)

Both the *Branzburg* plurality and Mr. Justice Powell, concurring, recognized that First Amendment values are implicated by limitations upon gathering news or safeguarding confidential sources; however those opinions are turned inside out to utilize the refusal to create a privilege for news sources in *Branzburg* as precedent for creating an absolute privilege for the media defendant's disclosure of state of mind matters in a libel action.

Moreover, Chief Judge Kaufman's opinion ignored the factors particular to libel actions where discovery is sought concerning the reporter's subjective state of mind which distinguish that situation from the usual circumstances where identity of a confidential source is sought. In the libel case, the reporter is a party being asked to account for his or her own activities in publishing statements alleged to be outside *Sullivan* principles; in other cases, the

reporter's own activity is not the subject of the claim of wrongdoing and the information sought which involves the newsgathering activity serves the purposes of persons engaged in litigation to which the reporter is not a party. Thus, Chief Judge Kaufman, relying upon *Baker* v. *F & F Investment*, 470 F. 2d 778 (2d Cir. 1972), *cert. denied* 411 U.S. 966 (1973), a non-libel action involving a request for a non-party journalist's sources on a matter tangential to the case, asserted that *Baker* "elaborated on the privilege established by *Branzburg*" to find protection of confidential source disclosure "compelled" by the First Amendment (P 8a-9a and n.12). While *Baker* held that First Amendment interests required a balancing approach on matters of compelled source disclosure, it specifically recognized and approved the distinction which existed between the factual situation before it and a libel case. *Id.* at 783-784. The key to this distinction is found in *Garland* v. *Torre*, 259 F. 2d 545, 550 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958),* which held that a journalist must reveal sources where the questions asked go "to the heart of the plaintiff's claim". While acknowledging that freedom of the press was "vital" to a free society, then Judge Potter Stewart found that this freedom was "not an absolute."

> . . . [B]asic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.
>
> (*Id.* at 548)*

Numerous decisions have recognized the difference between cases where accountability for the journalist's publications is at issue in a litigation and cases where the fruits of the efforts of those engaged in the newsgathering process are sought to be used for litigation involving others. *See e.g., Carey* v. *Hume*, 492 F.2d 631, 635-636 (D.C. Cir. 1974); *pet. for cert. dism.*, 417 U.S. 938 (1974);** *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 81-82 (E.D.N.Y. 1975); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973); *Caldero* v. *Tribune Publishing Co., supra; Dow Jones & Co., Inc.* v. *Superior Court*, 364 Mass. 317, 303 N.E. 2d 847 (1973); *State* v. *Buchanan*, 250 Or. 244, 436 P. 2d 729 (1968) *cert. denied*, 392 U.S. 905 (1968); *Winegard* v. *Oxberger*, 3 Med. L. Rep. 1326, 1329-1330 (Iowa Sup. Ct. 1977), *cert. denied*, 46 U.S.L.W. 3709 (U.S. May 15, 1978); *Ammerman* v.

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* Although Chief Judge Kaufman mentioned *Garland* in a footnote (P 9a, n.12), the critical distinction between that case and source disclosure issues in the non-libel area exemplified by *Baker* was not discussed. The *Branzburg* plurality opinion makes specific approving reference to the *Garland* holding denying a claim that the First Amendment exempted confidential information from public disclosure in a civil suit, 408 U.S. at 685-686. The emphasis in Mr. Justice Powell's concurrence upon the relationship of the challenged inquiry to the subject of the investigation also reflects approval of the *Garland* holding. *Id.* at 710.

* Justice Stewart, although dissenting in *Branzburg*, nonetheless reaffirmed the *Garland* holding and the occasions where compelled disclosure of media sources is required, 408 U.S. at 743, and n. 33.

** The concurring opinion in *Carey* v. *Hume, supra*, 492 F. 2d at 640-641, described the countervailing values involved in the balancing process central to the *Garland* rule: "The news media must be free but it should also be responsible. To hold that it is responsible to the same extent as all other citizens are responsible for libelous publications, with the additional freedom recognized in *New York Times*, does not amount to an infringement on the constitutional guarantee of free speech and the freedom of the press. [Citation omitted] . . . the constitutional grant of 'freedom . . . of the press' *does not convey an absolute immunity to publish libelous information that it receives and then protect itself and the source by exercising a privilege that prevents the victim from proving the malicious intent of the source or publisher.*" (emphasis added)

Hubbard Broadcasting, supra, 3 Med. L. Rep. at 1622-1623; *Cf. Anderson* v. *Nixon, supra,* 444 F. Supp. at 1199.*

As noted by Judge Meskill, dissenting below, courts are to consider First Amendment values implicated by discovery matters. However, such consideration is neither tantamount to a source disclosure privilege nor a precedent for denying critical state of mind evidence in a libel action:

> Contrary to the suggestions of my colleagues, there is presently no constitutional privilege against disclosure of a journalist's confidential sources, either in the criminal context [citing *Branzburg*] or in the civil context [citing *Garland*, ... *Baker* v. *F&F Investment* . . . which is cited by the majority as supporting such a privilege, merely held that a district judge in a civil case did not abuse his discretion in denying a motion to compel a non-party journalist to disclose the identity of a confidential news source where the identity of the source was of questionable materiality to the plaintiff's cause of action and could be obtained by other means. . . . The decision stands for the proposition, with which I wholeheartedly agree, that the public interest reflected in the First Amendment and in State "newsman's privilege" statutes is entitled to be considered when a district judge exercises discretion with regard to discovery matters. The decision recognized no privilege. In view of *Branzburg* and *Garland* it could not have. . . . Thus, to the extent that the majority relies on "the privilege established by *Branzburg*" and its elaboration in *Baker,* today's decision is without precedential foundation.*

(P 48a-49a; citations and quotation omitted)

In cases where compelled source disclosure has been in issue, the claimed impact upon the media's recognized newsgathering function has been documented. In *Branzburg,* for example, affidavits were submitted by members of the press community attesting to the dangers attendant to forced relevation of confidential sources, 408 U.S. at 693, n.31; 699 and n.38; *see also, id.* at 730-732 and n.8; 736, n.20 (Stewart, J., dissenting). Yet the Court was unwilling to protect such disclosure by constitutional privilege. However, as noted by Judge Meskill, the decision below has created a new and absolute protection "based on claims of chilling effect that depend on the imaginations of judges rather than proof supplied by the parties" (P 52a).** As a

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* *Cervantes* v. *Time, Inc.,* 464 F. 2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973) did not create a privilege from confidential source disclosure (see P 9a, n.12). Indeed, *Cervantes* specifically states: "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine these sources. . . ." 464 F. 2d at 994. Summary judgment was granted and affirmed notwithstanding one open request for source disclosure, where, despite extensive pre-trial discovery, Mayor Cervantes had been unable to "present little more than a series of self-serving affidavits . . . which framed but a minimal assault on the truth of the matters contained in the four paragraphs." *Id. Cervantes* is thus no more than an example of *Garland* in practice.

* The consideration of First Amendment concerns involved in weighing issues of confidential source disclosure has led other courts to require disclosure of editorial matters. *See, e.g.: Gilbert* v. *Allied Chemical Corp.,* 411 F. Supp. 505, 511 (E.D. Va. 1976) ("There is in the Court's view, no basis in the First Amendment for a privilege relating to a reporter's or editorialist's slant on a news story or editorial. Only if material requested directly leads to the disclosure of confidences does the privilege attach."); *Winegard* v. *Oxberger, supra,* 3 Med. L. Rep. at 1327 (disclosure required not only of sources but also "preparation of the articles, and procedures followed in editing them").

** A 1971 survey of journalists, for example, indicated that more than 90% of those interviewed were more concerned with protecting confidential sources than with protecting the content of confidential information acquired in the newsgathering process. Blasi, The Newsman's Privilege: An Empirical Study, 70 Mich. L. Rev.

practical matter, there may be some basis to the view that disclosure of confidential sources may have an effect upon the newsgathering process because it could result in a drying up of news sources in the future by reason of the very disclosure and without regard to whether the inquiry involves protected activities of the journalist. In contrast, disclosure of the reporter's editorial judgment does not itself dry up or impair any news sources for the future. Such disclosure, moreover, occurs in the context of discovery directed at ascertaining whether the journalist has acted outside the orbit of constitutional protection. In short, such disclosure is directed at having the journalist account for his calculated and reckless falsehoods; and it is only the publication of such falsehoods which may be deterred in the future.*

The misapplication of this Court's views in the area of compelled source disclosure is perhaps best illustrated by a comparison between the concerns which led Chief Judge Kaufman to enunciate an absolute immunity and this Court's unanimous recognition in *United States* v. *Nixon, supra*, 418 U.S. at 709-710, that a claim of privilege to withhold information from courts of law is not to be lightly bestowed, even in a case where the privilege claimed belonged to the President of the United States. Chief Judge Kaufman found that "a reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypoth-

229, 277-278 (1971). *Cf. United States* v. *Liddy, supra,* 354 F.Supp. at 215-216 and n.31. *See also,* Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 329-332 (1970).

* Not only does such disclosure involve the publication of statements undeserving of any constitutional protection, *see* pp. 23-25, *supra,* but it is also consistent with the objective of a press that conducts itself responsibly. *Cf. Nebraska Press Association, supra,* 427 U.S. at 560; *Pennekamp* v. *Florida, supra,* 328 U.S. at 365 (J. Frankfurter, concurring).

eses and alternatives which are the *sine qua non* of responsible journalism." (P 13a). Chief Justice Burger, however, rejected a similar contention concerning the possible chill upon the executive decision-making process: "The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712.

Requiring a journalist to give relevant evidence in a libel action does not affect legitimate news activities or press functions. Disclosure of evidence relevant to establishing actual malice would have no impact upon future publication of any matters other than false and defamatory statements dishonestly made.

> The underlying rationale of the First Amendment protection of freedom of the press is clear. In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. . . . We cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.
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> (*Caldero* v. *Tribune Publishing, supra,* 562 P. 2d at 801)

In the present situation, the fact that the information sought from defendants went to the "heart" of plaintiff's claim was recognized by the District Court (P 60a; P 64a-66a; P 91a) as well as by Judges Oakes and Meskill below (P 40a-43a; P 46a-47a). That the lawsuit is not "frivolous" is amply demonstrated by the claims set forth in the complaint (8a-88a) and the facts developed to date (*see* pp. 9-17, *supra; cf.* P 18a, P 22a, P 40a). It is also amply clear that evidence of defendants' state of mind is not, by

its very nature, directly obtainable by other means. The difficulties of requiring a libel plaintiff to look elsewhere for information uniquely under defendant's control were discussed by District Judge Haight (P 63a).* In short, due consideration was given by the District Court to the factors discussed in *Garland* and other source disclosure decisions where First Amendment claims were asserted in an attempt to bar disclosure.

Thus, while the majority below mischaracterized and misapplied the source disclosure cases to create a new privilege for the editorial process, the District Court's discovery rulings were made with full regard for the legal analysis and First Amendment cautionary principles articulated in those decisions. The concerns of the First Amendment have been and can be properly addressed within the framework of the *Sullivan* principles without the creation of a new privilege.

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* The difficult task of ascertaining alternative state of mind proof cannot be overstated. Chief Judge Oakes suggested that Freedom of Information Act materials obtained by Herbert might make defendant's state of mind "provable without directly impinging on the editorial process" (P 40a). However, it is far from clear whether these documents would even be admissible under the rationale of the decision below (*see* p. 27, n** *supra*). In addition, such information would normally be difficult to come by except in the limited class of cases where a plaintiff will have access to this unique statute. Finally, Chief Judge Kaufman discussed the nature of the evidence which could be submitted to the jury for "inference" as to actual malice (P 22a), much of this information was disclosed to plaintiff during discovery of facts pertaining to the editorial process. Thus, the ultimate admissibility into evidence of such matters is left in doubt (P 45a, n.38).

POINT IV

Preferred Treatment of the Institutional Press Under the First Amendment Is Not Soundly Supported by Either History or Precedent and Would Create Conflicts in Principle and Confusion in Practice by Creating Group Priorities for First Amendment Protections.

Judge Oakes found the absolute editorial process immunity to be based upon an "evolving recognition of the special status of the press in our governmental system and the concomitant special recognition of the Free Press Clause of the First Amendment" (27a). Relying upon a theory advanced by Mr. Justice Stewart which suggests that a structural, institutional distinction should characterize society's view of a free press, Stewart, Or of the Press, 26 Hastings L.J. 631, 633 (1975), Judge Oakes expanded this distinction to create superior rights for the press. This interpretation places equally important First Amendment values in contradiction, and creates a preferred status for some individuals or groups within our society which diminishes the rights and privileges of others. This treatment of the Free Press Clause does not have the support of either history or judicial precedent.

The Historical Considerations

Commentators on the history and intentions of the Speech and Press Clauses have pointed out that no separate, preferred position for the press was intended to be made within the First Amendment's proscription against abridgement of speech *and* press. *See, e.g.,* L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 173-174 (1960); Lange, The Speech and Press Clauses, 23 U.C.L.A. L.Rev. 77 (1975); L. Levy, Freedom of the Press, *supra* at lv-lvi, 41-42. Chief Justice

Burger recently observed in his concurring opinion in *First National Bank of Boston* v. *Bellotti,* —— U.S. ——, 46 U.S.L.W. 4371, 4380 (U.S. April 26, 1978) that, despite disagreements over the exact intentions of the framers when drafting the language of the First Amendment, the Speech and Press Clauses were of equal value, with the special mention of the Press Clause resulting from the particular American historical experience where the Press "had been more often the object of official restraints." *See also: Lange, supra,* at 100-101; *cf.* Nimmer, Is Freedom of the Press A Redundancy: What Does It Add To Freedom of Speech?, 26 Hastings L.J. 639, 640-641 (1975); F. Holt, *Of the Liberty of the Press,* reprinted in Freedom of the Press From Hamilton to the Warren Court 17-20 (H.L. Nelson ed. 1967).*

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* Throughout the Colonial period in America and during the period just prior to ratification of the First Amendment, the press was the object of official prior restraints to which the spoken word was not susceptible. Levy, Legacy of Suppression, *supra* at 173-174. Although the licensing system had expired in Britain in 1694, licensing of the right to report official proceedings of the Colonial Assembly persisted in Massachusetts until 1721, in Pennsylvania until 1722 and was in effect in New York as late as 1753. *Id.* at 44, 46. A stamp tax on newspapers was put into effect in Massachusetts in 1785, to be followed by an advertisement tax in 1786. See *Grosjean* v. *American Press Co.,* 297 U.S. 233, 248 (1936). Governmental prior restraint was met with efforts to secure for the press freedom from such controls. *See, e.g.,* F. Holt, Of the Liberty of the Press, *supra*; Jefferson, *Draft of A Constitution For Virginia,* reprinted in Basic Writings of Thomas Jefferson 182, 190 (Foner ed. 1944); Levy, Legacy of Suppression, *supra* at 203. Thus, the Framers had had ample experience with governmental attacks in the form of economic restraints upon the printing trade. They gave specific constitutional protection from the application of federal power to the press because they wanted to ensure that the printed word was insulated from the types of governmental intrusions to which it, as distinct from the spoken word, was vulnerable. Elevation of the trade itself to a favored place in the American body politic was not the intent of the Free Press guarantee.

The equal weight appropriate for the Speech and Press Clauses is compelled by the historical nexus between the two rights. As one commentator on the heritage of freedom of expression has observed:

> Among the important lessons in this heritage, it would seem, were these: There were, of course, differences between free speech and a free press. The former was by far the older and, of the two, more basic. Yet it was the latter which had amplified the former and given it meaning for the common man. It was entirely appropriate that the two concepts be used interchangeably for, in as nearly literal a sense as propositions of this sort can ever acquire, the two were functionally inseparable. Free speech could not exist in the fullest sense without freedom of the press; a free press, on the other hand, had no occasion to exist without freedom of speech. Thus viewed, the two could scarcely be set apart for neither had ever quite existed without the other.
>
> (Lange, *supra* at 96)

Precedential Considerations

In many decisions this Court has emphasized that there is no constitutionally approved process of ranking beneficiaries of First Amendment rights. While the press guarantee protects the dissemination of views and information to the public, it has not been thought that members of an "institution" known as the press or the media are somehow in a more preferred position than others protected by the First Amendment's language. Reordering Constitutional rights to prefer one over another where they were granted in equal terms is inappropriate.*

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* As noted by Chief Justice Burger in *Nebraska Press Assn., supra,* 427 U.S. at 561:

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amend-

This Court has never found that constitutional protection afforded by the *Sullivan* principles varies in scope or depth between speech and press. In *Sullivan* itself, both rights were before the Court. A separate petition for certiorari filed by the four individual defendants was granted from the same judgment appealed by the Times "because of the importance of the constitutional issues involved". 376 U.S. at 264. Mr. Justice Brennan's opinion begins by describing those issues:

> We are required in this case to determine for the first time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against *critics* of his official conduct.*
>
> (*Id.* at 256; emphasis added).

The Court expressed its belief in the equal value placed by the First Amendment upon both individual speakers and the media community in its rejection of the claim that the challenged advertisement was mere "commercial" speech:

> Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press . . .

ment rights, ranking one as superior to the other. . . . But if the authors of those guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

* In a footnote the Court described its determination of the issues: "[W]e sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press. . . ." *Id.* at 264, n.4.

> The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *
>
> (*Id.* at 266; citations omitted)

Cf. Garrison v. *Louisiana, supra.*

The *Sullivan* actual malice standard has not been limited to the press in other settings. *See, e.g.: Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974) and *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966) (*Sullivan* standard adopted "by analogy" in the area of federal labor law); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) (dismissal of school teacher violated free speech rights in absence of proof of false statements knowingly or recklessly made).**

Lower courts have applied the *Sullivan* principle to non-media defendants. *See, e.g.: Evans* v. *Lawson,* 351 F.Supp. 279 (W.D. Va. 1972) (members of private organization); *Silbowitz* v. *Lepper,* 32 A.D. 2d 520, 299 N.Y.S. 2d 564 (1st Dept. 1969) (postal worker suing union officer); *Cf. Davis* v. *Schuchat,* 510 F.2d 731, 734 n.3 (D.C. Cir. 1975) ("Our understanding of *New York Times* and its offspring is that private persons and the press are equally protected by the requirement that false comment about public figures must be knowing or in reckless disregard of the

* As Mr. Justice Goldberg noted in his concurring opinion, "[t]he theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern. . . ." *Id.* at 298-99.

** "It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times." *Id.* at 573.

truth in order to be actionable").* No differential status for certain individuals or groups who perform functions under the Press Clause has been recognized. In *Lovell* v. *Griffin,* 303 U.S. 444 (1937), the distribution of a pamphlet and a religious magazine was held protected under the Press Clause because "every sort of publication which affords a vehicle of information and opinion" was encompassed by that Clause. *Id.* at 452. In *Mill* v. *Alabama,* 384 U.S. 214, 219 (1966), Mr. Justice Black forcefully reiterated the non-exclusive nature of the protection of the "press":

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars [citation omitted] to play an important role in the discussion of public affairs.

This Court has consistently declined to provide to the "institutional" press information or access to information not available to members of the general public. See, e.g.: *Nixon* v. *Warner Communications, Inc.* —— U.S. ——, 46 U.S.L.W. 4320, 4326 (U.S. April 18, 1978); *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974); *Estes* v. *Texas,* 381 U.S. 532, 589 (1965).**

A rule which distinguishes among recipients of the Press Clause grant of rights must inevitably involve the

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* *See generally,* for a discussion of state court decisions which have extended the *Sullivan* rule to non-media defendants, Eaton, "The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer", 61 Virginia L. Rev. 1349, 1406-1407 and cases cited in notes 234-237 (1975).

** In *Landmark Communications, Inc.* v. *Virginia, supra,* this Court held unconstitutional a state's attempt to punish a newspaper criminally for its truthful reporting of confidential judicial review commission proceedings. "Strangers" to the review proceedings were found protected by First Amendment guarantees in truthfully divulging those proceedings to the public. The Court did not limit the protection to the news media alone. 46 U.S.L.W. at 4391.

courts in determining when "the publishing business" is involved as well as who is encompassed within that industry. Such judgments have long been disfavored.*

In *Branzburg,* Mr. Justice White found that the task of administering a constitutional newsman's privilege would involve the judiciary "on a long and difficult journey to . . . an uncertain destination":

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.
>
> (408 U.S. at 704)

See also: Gertz, supra, 418 U.S. at 346.

Judge Meskill, dissenting below, found that creation of special constitutional status for the editorial process would result in a preferential selection among persons equally situated under the First Amendment:

> [B]efore the Court can recognize any special, preferred position for the press as an institution, it must necessarily recognize a distinction between personal

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* In *Bellotti, supra,* Chief Justice Burger wrote:

> The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination.
>
> (46 U.S.L.W. at 4381; citations omitted)

rights on the one hand and institutional rights on the other. . . . If we distinguish between institutional and personal rights to liberty of the press and place the former in a preferred position, then we necessarily place the latter in a subordinate position. The First Amendment interest of the public in having access to the truth is not necessarily better served by an institution than an individual.*

(P50a; citations omitted)

Judge Oakes conceded his institutional reading of the Press Clause "creates an inconsistency between judicial treatment of the press on the one hand and non-press defendants on the other" (an inconsistency he suggests could be resolved by eliminating libel actions by public figure plaintiffs) (37a, n.25). He further urged that he was "not mak[ing] the distinction between the institutional press and the individual pamphleteer" but rather "between communicative functions properly protected under the Free Press clause and expression protected by the Free Speech guarantee" (43a, n.34). The flaw in Judge Oakes' analysis in his use of functional distinctions as a basis for elevating some institutions who perform the communicative function above others who also perform that function and above all who perform the expressional function.

In *Bellotti,* Chief Justice Burger found that the basic difference between the Press and Speech Clause was one of function:

> The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs while the Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle

* *Cf. Bellotti, supra,* 46 U.S.L.W. 4380 (Burger, C.J., concurring).

> of information and opinion.' . . . Yet there is no fundamental distinction between expression and dissemination.
>
> (46 U.S.L.W. at 4380; citation omitted)

However, the Chief Justice concluded that this functional difference afforded no basis to confer a preferred status on a limited group performing the press function:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." *Pennekamp* v. *Florida,* 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).
>
> (*Id.* at 4381)

Mr. Justice Powell, for the majority, also concluded in *Bellotti* that the interests of the First Amendment would not be served by affording greater protection under that Amendment to the institutional press than to others:

> If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment.
>
> (*Id.* at 4376, n.18)

Other Considerations

Chief Judge Kaufman and Judge Oakes posited the editorial judgment privilege in terms solely applicable to the institutional press with its editors, broadcasters and editorial rooms. *Compare:* P 9a-11a and P 27a, P 32a, P 35a. An example of the anomaly which would thereby result may be found close to the instant case. Defendant Lando's answer avers that, following plaintiff's interview by Wallace for the program, he told Herbert he would "get" Herbert "by suing him for libel" (96a-97a, 112a). Assuming that such a libel suit had been commenced, Herbert would not be able to claim immunity from disclosing his state of mind, although Lando would be able to do so. Thus, the same protagonists would have vastly different rights in the judicial arena although the First Amendment ostensibly accorded both individuals its protection.

Other examples of the illogical results abound. A newspaper reporter writes a story charging a public figure with narcotics smuggling; a speaker at a drug-abuse seminar presents the same accusations. A television anchorman accuses a district attorney of corruption and perjury; a bar association official sends a newsletter to members making the same charges. A national newsmagazine presents an "exposé" of corruption and bribery involving two judges; a free-lance writer submits such an "expose" to a small muckraking magazine which publishes it. A public television network presents a film examining hospital services which states that a leading heart surgeon has caused the deaths of many patients due to negligent practices; a public service corporation produces a documentary film containing an identical attack which is distributed to public schools and colleges. In each of these instances only the member of the "institutional" media may conceal information concerning his intentions, conclusions, bases for conclusions and his views as to the credibility of sources

for such statements in a libel action brought by the person seeking to vindicate his or her reputation.*

Even those who have argued that the Press Clause should be read expansively to recognize a special press status have not arrived at the same conclusion reached by Judge Oakes. It has been urged that this privileged position means that government must remain strictly neutral in its dealings with the press. "The government may not . . . single out the press for either conferral of a benefit or imposition of a burden." *See, e.g.:* Bezanson, The New Free Press Guarantee, 63 Virginia L. Rev. 731, 733-734 (1977). Subjecting the press to neutral government regulation broadly applicable to press and non-press alike would avoid the threat of governmental censure or control that might result if the state could pursue a policy of either special awards or sanctions for press institutions. The neutrality principle has led Professor Bezanson to conclude that the District Court order in the instant case was consistent with this theory, declaring the generally applicable discovery rules properly applied to these media defendants. "To exempt the press from such inquiry under legal requirements of general application . . . would constitute a breach of neutrality much like that rejected by the Supreme Court in *Branzburg* v. *Hayes.*" *Id.* at 766.**

The Press Clause serves a vital role in our society in providing First Amendment protection for communicative

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* Another danger of elevated rights for the institutional press was noted in *Davis* v. *Schuchat, supra,* 510 F.2d at 734, n.3: "[I]f the 'press' were given more protection than 'private speech', persons would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting."

** This analysis would explain the relationship between a concept of the institutional press' rights under the Press Clause and the rejection of the media's claim to special access and newsgathering rights in *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974) and *Pell* v. *Procunier, supra. Cf. Nixon* v. *Warner Communications, Inc., supra,* 46 U.S.L.W. at 4326.

functions critical to the dissemination of information required to fulfill the basic aims of that Amendment. Neither the historical origins of the free press guarantee, nor the jurisprudential interpretations of First Amendment protections or the cases requiring protection of the press from certain governmental activities, support turning the Press Clause into a grant of special treatment more favorable than that afforded by the Free Speech Clause or into a bestowal of privileged status to a highly organized and institutionalized form of information dissemination. The result of Judge Oakes' analysis is to place the institutional media in a First Amendment position significantly higher than all others performing disseminational or informational functions and all performing the expressional functions of the Amendment. Such a result is not constitutionally sound. As eloquently declared by Chief Justice Burger in *Bellotti, supra,* 46 U.S.L.W. at 4381:

> In short, the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the Court of Appeals for the Second Circuit be reversed and that the Order entered by the District Court be reinstated in its entirety.

Respectfully submitted,

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EXHIBITS

Exhibit I

29 November 1972

MEMORANDUM FOR RECORD

SUBJECT: Request for information and support to Barry Lando, CBS-60 Minutes

1. Yesterday Mr. Barry Lando, producer for 60-Minutes, visited OCINFO-PI to discuss the type of information and interview support he desired in preparation for a proposed segment for 60-Minutes, tentatively to be aired in January 1973 and concurrently with the release of LTC Herbert, USA-Ret, book *Soldier*.

2. Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not be debunked, then there will be no story. There is no intent to puff Herbert and his book, although it is apparent that any network show, especially a controversial one, will have as a side effect, promotion of Herbert's book sales. On balance I believe it is to the best interests of the Army to cooperate selectively, supporting Lando's research and requests on the assumption that the basic premise stated above will not change. Perhaps the premise will change, if so we are not going to come out looking good.

3. In past research dating back to his original query to OASD(PA) on 8 March 1972, Lando has become very familiar with Herbert's stories and many inconsistencies therein. After an interview with members of the OCINFO staff on 13 March, Lando has been gathering data and talking with former associates of Herbert. On 27 June he had a filmed interview with MG Barnes during which the general addressed his relationship with Herbert.

Exhibit I

4. At yesterdays meeting Lando asked that he be put in contact with several officers (see attached list) for the purpose of background interviews. No doubt he will ask that one or more of these men consent to a filmed interview at a later date. Lando also asked for factual data on the OPLAN MISSOURI story, Herbert's middle-east experiences, his Cuban experience, and the peace march at Ft. Leavenworth.

5. Mr. Lando has been advised that his point of contact for all queries related to this project is ASD(PA). Should he contact this office his request will be taken but no response will be given without ASD(PA) approval. Some of the individual in whom he has interest are retired Army. PA assistance will be given to those retired personnel who seek it. This office will contact all of the individuals on the attached list and determine if they desire to talk to Lando. We will set up a schedule for those who agree.

/s/ LEONARD F. B. REED, JR.
LEONARD F. B. REED, JR.
LTC, GS
Chief, News Branch, DAIO

1 Incl

Exhibit II

INTERVIEW REPORT

Date: 4 Dec 72

Interviewer and Affiliation:

Barry Lando, CBS-60 Min

Interviewee and Organization

Col J Ross Franklin, USACDC

Reported by:

Monitored by:

LTC Reed

Subjects Covered in Interview:

1. Relationship with Herbert; reports of war crimes
2. Whereabouts on 14 Feb 69—provided 2 personal checks cashed in Hawaii
3. Evaluation of Herbert—excellent tactical commander who had a continuous propensity to lie and/or exaggerate
4. Reason for releif [sic]—lost confidence
5. The duck
6. Living conditions within the Bde Hq area
7. Franklin's own career
8. Torture in the MI compound

Exhibit II

Brief Summary of Interview: *(Mandatory for sensitive intelligence subjects. Optional for all others.)*

Col Franklin was extremely candid in his remarks on all subjects, admitting where appropriate that he was not up to speed in possibly not having a complete grasp of all that was taking place in the MI compound. Lando persists in contention that he is interested in debunking Herbert—similar to Neil Sheehan's treatment of the Arnheiter Affair. Lando indicated that he has come to totally disbelieve Herbert. After the interview he informed me that Mike Wallace has agreed to do the narration and is equally convinced that the story is in debunking Herbert. Lando asserts that he has final decision on the segment and it will not go unless he can convincingly portray Herbert as the bad guy.

Exhibit III

20 December 1972

MEMO FOR THE RECORD

SUBJECT: CBS 60-MINUTES SEGMENT ON LTC HERBERT

Barry Lando, producer of the subject program met with MG Sidle today to discuss his research to date and to request support for the production of the program. Lando indicated that his piece is aimed at debunking Herbert in his long fight against the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to "puffing him up." He plans to focus on four or five events which are contained in Herbert's book and factually destroy Herbert's credibility.

Lando requested assistance in obtaining filmed interviews with the following:

MG Sidle—discuss the press handling of Herbert and his promotion

Col Franklin—relationship with H. and war crimes allegations

LTC Nicholson—ditto (H)717 249-2553

Maj Krouch—ditto

SGM Bittorie (Ret) the duck he didn't eat A/C 404/689-2994

Lando requested further assistance on the following subject areas:

off the record access of CID investigation or at least that portion relating Cpt Donavan's testimony

information regarding phone call from Buck Newman to Herbert

Exhibit III

name of black Lt mentioned in Fact sheet who didn't want to go to field

information concerning MACV IG investigation of mistreatment of detainees by 172d MI det in Jun Jul 69

record of Herbert testimony supporting factsheet remark that Herbert stated under oath that he didn't report crimes to MG B rnes

Names of some of those whom Herbert allegedly struck

Confirmation that Herbert was a member of Gemini recovery team in 64

Information of action surrounding withdrawal of Art 15

Request that OCINFO contact following to inform that Lando wants to talk to them on background

Ernesrt Webb- Maj- stationed USMA
Paul H. Ray-Maj- stationed SJA School (A/C 703-293-4730) Stiener-Col-stationed Ft Bragg

Information of the itinerary of War Heroes of Korean era (Search of Archives turns nothing.)

Gen Sidle indicated we would help as much as is possible within the bounds of propriety and command guidance.

Cy to

ASD (PA) A/v

/s/ Leonard FB Reed Jr
Leonard FB Reed Jr.
LTC, GS